No. 88-1432

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

MARIA ESPARZA et al.,

*Petitioners,*

v.

RUBEN VALDEZ, Executive Director,
Colorado Department of Labor, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Eleventh Amendment bar a federal court from awarding retroactive monetary damages against state officials on a claim pursuant to 42 U.S.C. § 1983 (1982) that those officials withheld unemployment benefits allegedly owed to aliens under the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(14) (1982)?

2. Should *Hans v. Louisiana*, 134 U.S. 1 (1890), interpreting the Eleventh Amendment to bar suits against States in federal court for a violation of federal law, be overruled?

## LIST OF PARTIES

The respondents agree with the List of Parties set forth in the Petition for Writ of Certiorari, with the following exception:

1. Respondent John Kezer has ceased to hold the office of Director, Division of Employment and Training. No successor has been appointed and the position is currently vacant. The petitioners have listed Robert Husson, Director, Division of Labor, as the current successor to Respondent John Kezer. However, the Director of the Division of Labor, as distinct from the Director of the Division of Employment and Training, has no authority over the programs at issue in these proceedings. *Compare* Colo. Rev. Stat. §§ 8-1-103 and 107 with 8-71-101 and 102 (1986) (defining the powers and duties of, respectively, the Director of the Division of Labor and the Director of the Division of Employment and Training). Therefore, the Director of the Division of Labor should not be listed as a successor to a party to this case under United States Supreme Court Rule 40.3.

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## STATEMENT OF THE CASE

The respondents hereby incorporate by reference the statement of facts found in the opinion of the United States Court of Appeals for the Tenth Circuit in Case No. 85-2187, reported at 862 F.2d 788 (10th Cir. 1988), and reprinted in the Appendix to the Petition for Writ of Certiorari at 1a.

## REASONS THE WRIT SHOULD BE DENIED

### I.

### THE HOLDING OF THE TENTH CIRCUIT, THAT THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ORDERING A RETROACTIVE MONETARY AWARD AGAINST A STATE OFFICIAL WHO DENIED UNEMPLOYMENT BENEFITS TO ALIENS, CORRECTLY FOLLOWED AND APPLIED FEDERAL LAW; MOREOVER, DUE TO THE POSTURE OF THE CASE AND THE STATE OF THE RECORD ON APPEAL, THIS CASE IS NOT ONE IN WHICH THIS COURT SHOULD EXERCISE ITS RIGHT OF DISCRETIONARY REVIEW.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This amendment has been interpreted to afford an unconsenting State immunity from suits brought in federal courts both by her own citizens and by citizens of another State. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). Even when a

State is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 663 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

In *Ex parte Young*, 209 U.S. 123 (1908), the Court created an exception to the general principle of state sovereign immunity embodied in the Eleventh Amendment by holding that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State within the meaning of the Amendment. *Id.* at 159-160. This holding was based "on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity." *Papasan v. Allain*, 478 U.S. 265, 276 (1986). While *Young* held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law, *Green v. Mansour*, 474 U.S. 64, 68 (1985), the Court has repeatedly refused to extend the *Young* exception to claims for retroactive relief. *Id.* at 68; *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 102 (1984); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman*, 415 U.S. at 668.

Relying upon a well established line of cases, *e.g.*, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944),

which holds that suits by private parties seeking to impose liabilities which must be paid from the public funds in the state treasury are barred by the Eleventh Amendment, the Court held in *Edelman* that the Eleventh Amendment bars an order for retroactive payment for public benefits alleged to have been wrongfully withheld. *Edelman*, 415 U.S. at 663.

*Edelman* acknowledged that even prospective relief under the *Young* exception may have a fiscal impact upon a State, but reasoned that such a consequence was "the necessary result of compliance with decrees which by their terms were prospective in nature." *Id.* at 668. A retroactive monetary award, however, would require

> [p]ayment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.

*Id.* at 668. Holding that such a retroactive monetary award was "in practical effect indistinguishable in many aspects from an award of damages against the State," *id.* at 668, the Court concluded that the award would

> [t]o a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

*Id.* at 668. Consequently, such an order was prohibited by the Eleventh Amendment. *Id.* at 663.

Here, the Tenth Circuit relied upon *Edelman* to reach its conclusion that a retroactive monetary award against the respondent state officials was barred by the Eleventh Amendment (Pet. App., 15a-16a). The Tenth Circuit's opinion in no way alters the contours of current Eleventh Amendment law. To the contrary, its holding represents a straightforward and rather prosaic application of *Edelman* to a case with similar facts (Pet. App., 16a). Therefore, unless this Court wishes to go so far as to overrule *Edelman*, it need not grant certiorari merely to review a case which faithfully follows well established precedent.

Several other factors argue against the wisdom of further review. First, the record on appeal does not contain sufficient facts in evidence for this Court to make a considered decision on the specific point urged by petitioners as the basis for certiorari, i.e., the split among the circuit courts. In the lower court proceedings in this case, the question of the Eleventh Amendment bar was never put forward by the parties.[1] Rather, the Tenth Circuit

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[1] The respondents did not raise the question of Eleventh Amendment immunity in the lower courts because of their desire to have the federal courts reach the merits and construe certain provisions of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311 (1982). Such conduct does not constitute either a constructive or express waiver of the State's sovereign immunity. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, ___, 107 S. Ct. 2941, 2945 (1987) (Powell, J., plurality opinion); *Edelman*, 415 U S. at 673. Rather, a waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave

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raised the issue *sua sponte* in its published opinion (Pet. App., 14a).[2] Consequently, the record on appeal does not contain evidence of the impact of any retroactive damage award upon the State of Colorado.

While this Court might choose to take judicial notice of Colorado statutes governing Colorado's unemployment insurance fund, the parties had no opportunity below to present, and therefore the record does not now contain, any testimonial or documentary evidence about the way in which the state fund has been or is being operated, the extent to which the State may or may not be insulated from the fund, the fund's present fiscal solvency or lack thereof, the manner and circumstances in which the moneys in the fund may be paid out or replaced, or, perhaps most significantly, whether a retroactive monetary award would be paid exclusively from this fund or would be paid in part from other State assets or funds. Given the need in an Eleventh Amendment case to look at the substance, not merely the form, of the relief, *see Papasan*, 478 U.S. at 279, and to assess the effect of that

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no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673, (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). No such "unequivocal" consent, *see Green v. Mansour*, 474 U.S. at 68, is contained in this record.

[2] This Court has previously considered Eleventh Amendment issues raised for the first time on appeal, *e.g., Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 107 S. Ct. 2941 (1987) (Powell, J., plurality opinion); *Alabama v. Pugh*, 438 U.S. 781 (1978), and has even addressed the issue when it was raised initially in the Supreme Court. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945).

relief, *see Pennhurst*, 465 U.S. at 107, should this Court wish to consider whether certain state funds do not enjoy Eleventh Amendment immunity, an adequate factual record concerning the specific state fund at issue would be critical, if not indispensable, to the Court's determination. Since such a factual record is absent here, this would not be a propitious case in which to address that question.

Second, the contrast in equities between the parties is not as stark as the Petition would suggest. The Tenth Circuit concluded that the petitioners' claims for prospective relief were moot because, in effect, they had already received the relief which they had sought, either through the decisions of the state appellate courts or through Congressional or federal administrative actions (Pet. App., 9a-12a). The petitioners do not challenge this conclusion on appeal.[3]

Some of the putative class members have also obtained retroactive relief by pursuing their administrative remedies in the state court system. Still others have, in recent weeks, made formal requests to the respondents

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[3] The Colorado Supreme Court decisions in *Indus. Comm'n v. Arteaga*, 735 P.2d 473 (Colo. 1987) and *Div. of Employment and Training v. Turynski*, 735 P.2d 469 (Colo. 1987), adopted an interpretation of FUTA which would provide prospective relief to many of the petitioners. *See also Sandoval v. Colo. Div. of Employment*, 757 P.2d 1105 (Colo. Ct. App. 1988), *cert. denied*, Colo. Sup. Ct., Oct. 17, 1988 (which broadly construed the Colorado legislature's amendment of Colo. Rev. Stat. § 8-73-107(7)(a) (1986), effective July 1, 1985, defining the phrase "permanently residing under color of law"). Unlike *Sandoval*, *Arteaga* and *Turynski* involved pre-amendment claims.

for retroactive relief, and these requests are now being processed.[4] While these claims have not been finally settled, it is nevertheless conceivable that, were certiorari granted, by the time this case could be briefed, argued, and postured for a decision, all or most of the identified putative class members might already have received the relief to which they were entitled.

The petitioners' suggestion that this court should grant certiorari in order to provide the petitioners with a federal court forum for their § 1983 claim is unpersuasive. The equities of denying a federal court forum for retroactive monetary relief under § 1983 based upon Eleventh Amendment immunity have been carefully examined by this Court on several occasions in recent years and in each instance the Court has reaffirmed the principle that § 1983 does not create a waiver of the States' Eleventh Amendment immunity. *See Quern*, 440 U.S. at 345; *Edelman*, 415 U.S. at 676.

Therefore, considering both the state of this record as well as the fact of the Tenth Circuit's strict adherence in

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[4] The Petition for Writ of Certiorari apprised the respondents for the first time of the claims for relief of three new putative class members – Oscar Rivas, Eliodoro Madera, and Twumasi Ankrah (Pet., 10, n.6). Petitioners do not allege, and the record does not show, that Jose Sandoval, Daniel Agonafer and Consuelo Sandoval formally requested relief before February 17, 1989 (Pet., 10, n. 6). The apparent need for the petitioners to refer to correspondence and other facts which are not part of the record in order to articulate the complex factual setting of this case is but another indication that the abridged record here may be a serious impediment to a full consideration by the Court of the issues raised in the Petition.

its opinion to the now well established rule in *Edelman*, this is not an appropriate case for an exercise of this Court's power of discretionary review.

## II.

## THE COURT SHOULD NOT USE THIS CASE AS A VEHICLE FOR OVERRULING *HANS V. LOUISIANA*, 134 U.S. 1 (1890).

The general principal of state sovereign immunity represented by the Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), has been "adhered to without exception by this Court for almost a century." *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, ___, 107 S. Ct. 2941, 2956 (1987) (Powell, J., plurality opinion). To ignore *stare decisis* by overruling *Hans* would require this Court to "overrule the long and unbroken series of precedents" reaffirming *Hans*, and to reconsider other major decisions which have relied upon *Hans*. *See Welch*, 483 U.S. at ___, 107 S. Ct. at 2956 (Powell, J., plurality opinion). Only "the most compelling circumstances" can justify this Court's abandonment of such firmly established statutory precedents. *See Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 715 (1978) (Rehnquist, J., dissenting).

Yet notwithstanding the Court's respect for the doctrine of *stare decisis*, dissatisfaction with the *Hans* decision has prompted four members of the Court within a span of little more than two years to urge that *Hans* be overruled. *See Welch*, 483 U.S. at ___, 107 S. Ct. at 2958 (Brennan, J., dissenting); *Papasan*, 478 U.S. at 292 (Brennan, J., concurring in part and dissenting in part); *Green*, 474 U.S. at 74

(Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

As one member of this Court has previously noted, "the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it," are complex questions. *Welch*, 483 U.S. at ___, 107 S. Ct. at 2957 (Scalia, J., concurring in part and concurring in the judgment). The two principal holdings of *Hans* which have been challenged by the dissenters are that the federal judicial power does not extend either to suits against States that arise under federal law or to suits brought against a State by its own citizens. *Welch*, 483 U.S. at ___, 107 S. Ct. at 2956, n.27 (Powell, J., plurality opinion).

Although the case at bar does involve a question of federal law, it is not a suit by citizens against their own State. Factually, therefore, the case does not offer a basis for overruling the holding in *Hans* construing the Eleventh Amendment to bar suits against a State by its citizens. Nor, judging from the petitioners' phrasing of that question, do they urge overruling that aspect of the *Hans* decision (Pet., i).

Contrary to the petitioners' suggestion, reversal of the Tenth Circuit opinion here would not entail overruling the other main holding in *Hans*. As Argument I indicates, the narrow questions urged by the petitioners are essentially whether *Edelman* correctly limited the *Young* exception to Eleventh Amendment sovereign immunity to prospective relief and whether certain types of state funds fall "on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *See*

*Quern*, 440 U.S. at 347. The facts and the record in this case present neither the opportunity nor the need for the Court to consider the far broader question of the correctness of *Hans*. Because of this, this Court would be ill-advised to grant certiorari on that question.

## CONCLUSION

For the foregoing reasons, the respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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